No.

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

JUDY BOEKEN, AS TRUSTEE, ETC.,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, despite this Court's holding that the Federal Cigarette Labeling and Advertising Act (15 U.S.C. §§ 1331 *et seq.*) preempts state law "failure to warn" claims, states may use a "consumer expectations" theory to impose liability for failure to provide warnings about the dangers of smoking beyond the warnings mandated by Congress.

2. Whether a $50 million punitive damages award to a single plaintiff is unconstitutionally excessive when it is more than nine times the already substantial amount of compensatory damages and is based on purported harms to non-parties that bear no nexus to the plaintiff's injury.

RULE 29.6 STATEMENT

Petitioner's corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns ten percent or more of petitioner's stock.

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MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Philip Morris USA, respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal on rehearing (App., *infra*, 1a-78a) is reported at 26 Cal. Rptr. 3d 638 (Cal. Ct. App. 2005). The original opinion of the California Court of Appeal (App., *infra*, 79a-154a) is reported at 19 Cal. Rptr. 3d 101 (Cal. Ct. App. 2004). The Superior Court's opinion (App., *infra*, 155a-181a) is unreported but is available at 2001 WL 1894403.

JURISDICTION

The California Supreme Court denied review on August 10, 2005. App., *infra*, 182a. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. § 1334. Preemption

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

STATEMENT

Respondent Richard Boeken, a longtime smoker who contracted lung cancer, brought an action in California Superior Court (Los Angeles County) seeking damages for common-law fraud and product liability.[1] Respondent argued at trial that petitioner Philip Morris USA ("PM USA") should be held liable and punished for failing to give consumers a specific warning that the Marlboro Lights cigarettes he smoked were as dangerous as regular cigarettes. This Court held in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), that state-law failure-to-warn claims are preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.* (the "Labeling Act"). In an effort to avoide preemption, respondent therefore styled his claim as one for defective product design under California's "consumer expectations" test. That theory imposes liability on the manufacturer of any product that has "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Barker* v. *Lull Eng'g Co.*, 20 Cal.3d 413, 418 (1978). The "defect" here, respondent argued, was that the cigarettes "failed to perform as safely as an ordinary consumer would expect," due to petitioner's failure to warn of the health risks of Marlboro Lights. Over petitioner's objection, the jury was instructed that it could impose liability and compensatory and punitive damages on the basis of this "consumer expectations" theory.

The jury found in respondent's favor, awarding $5.5 million in compensatory damages and ***$3 billion*** in punitive damages. The trial court denied petitioner's request for a new trial, but reduced the punitive damages award to $100

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[1] For convenience, we refer herein to both Mr. Boeken and his successor as "respondent."

million, finding that "a ratio of approximately 20-to-1 is appropriate." App., *infra*, 167a-168a.

Petitioner appealed. The Court of Appeal affirmed the liability verdict, but, relying in part on a broad range of alleged misconduct – and the harms caused by smoking in general – determined that a punitive award of $50 million was permissible. The California Supreme Court denied review on August 10, 2005.

REASONS FOR GRANTING THE PETITION

This case raises the recurring question whether a plaintiff may evade the express preemption of state-law failure-to-warn claims by labeling the theory of liability as one for defective design under a "consumer expectations" test. The Court of Appeal deepened a preexisting conflict in authority on this issue.

In addition, this case presents a recurring question regarding the proper application of the ratio guidepost for evaluating punitive damages in cases where the compensatory damages are substantial. Following other courts that have rejected the specific guidance set forth in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), the Court of Appeal imposed a punitive award that is more than nine times the respondent's massive $5.5 million award of compensatory damages. In doing so, the court relied on allegations of unrelated harm to non-parties – thus exposing petitioner to the prospect of unfair multiple punishment – and explicitly refused to follow this Court's instruction that where, as here, "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. These are not isolated errors; rather, they are all too common in the wake of *State Farm*. Guidance from this Court is needed.